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No. 81-617

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

DAVID D'ANGELO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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The Government contends that petitioner was effectively represented "under any standard" of effective assistance of counsel.

1. The Government's memorandum in opposition contains several inaccuracies and distortions suggesting that petitioner had a fair trial with effective assistance of counsel. The opposite is plainly the case.

The Government implies that petitioner chose a jury, then, immediately thereafter, sought to get rid of his lawyer and substitute another (p. 2). In truth, the jury had been selected eight days before the trial began, by all of the defendants. The trial court was happy to delay the trial for eight days to permit the defendants to plead guilty, but was unwilling to allow petitioner any time in which to prepare a defense through counsel.

The Government characterizes petitioner's dissatifaction with his counsel as one concerning merely "matters of trial strategy" (p. 2). Whether a jury is waived may be in some sense a matter of "trial strategy," but it is incontrovertibly a fundamental right of the defendant, not of his lawyer. Whether one puts on a defense may, in some remote sense, be a matter of "trial strategy," but it is certainly a fundamental right of the accused, not of his lawyer.

Equally misleading is the reference to petitioner's "unidentified" defense (p. 2), which his unwanted lawyer had refused to prepare or present. New counsel attempted to explain the nature of the defense to the trial judge, but the judge refused to hear a description of it (DA 6). In short, it didn't matter to the trial judge or the court below that petitioner's unwanted attorney had insisted on the right to make all decisions (DA 19), had attempted to enter into stipulations and to waive a jury without consulting the accused (DA 19), had not prepared the defense (DA 19-20, 22), and that "we may have an innocent man here who has not prepared his defense" (DA 22).

It is neither accurate nor relevant to suggest that petitioner's unwanted counsel had represented him diligently "during the three months that [h]e had been counsel of record" (p. 2). The record indicates that during the pretrial hearings, petitioner's counsel played almost no role and, indeed, was *absent* much of the time. Moreover, it was only after selection of the jury, during the heavy-handed plea-bargaining phrase, that petitoner's counsel manifested his lack of fidelity to his client, his incompetence, and his lack of preparation.

2. In its efforts to show that petitioner's counsel was competent, the Government succeeds only in establishing petitioner's probable innocence (p. 4-7). Its claim that counsel was competent and effective under "any standard," *e.g.*, "reasonable competence," however, is ludicrous. A lawyer

who, during trial, is drunk, *Hudspeth v. McDonald*, 120 F.2d 962, 967 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941) ("What of it?", the court profoundly remarked), or asleep, *United States v. Katz*, 425 F.2d 928, 931 (2d Cir. 1970), can satisfy the "farce and mockery" test, but it surely is not the case that failure to prepare a defense or to prepare for trial, as here, is "reasonable competence." Nor can it be "reasonable competence" to invite numerous drug agents to give their opinions, based upon their professional "experience," that the defendant is guilty. That, and more, is what petitioner's counsel did to him and to his defense.

3. It is noteworthy that the Government does not defend the "farce and mockery" test which was applied to petitioner's claims. Nor does it deny that the Second Circuit's adherence to that test flouts not merely the unanimous view of all other Circuits but the considered expressions of this Court. Nor does the Government contest petitioner's assertion that the matter is one of fundamental importance and urgency. The only basis upon which the Government opposes the petition is its claim that petitioner's arguments "would properly have been rejected under any standard" (p. 7). As petitioner has shown, that is preposterous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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